

IN THE COURT OF COMMON PLEAS  
IN AND FOR THE COUNTY OF MONTGOMERY, PENNSYLVANIA  
CIVIL DIVISION

INTERNATIONAL UNION OF  
OPERATING ENGINEERS LOCAL 542

vs.

MALLINCKRODT ARD INC., FKA  
QUESTCOR PHARMACEUTICALS,  
INC., ACCREDO HEALTH GROUP,  
INC., CURASCRIPT, INC.,  
CURASCRIPT SD, EXPRESS SCRIPTS  
HOLDING COMPANY, ET. AL.

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: NO. 2018-14059  
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Motions Hearing

Thursday, June 13, 2019  
Commencing at 2:35 p.m.

Chanel R. Pyatt, RPR  
Official Court Reporter  
Montgomery County Courthouse  
Courtroom 8  
Norristown, PA 19401

BEFORE: THE HONORABLE STEVEN C. TOLLIVER, SR., J.

COUNSEL APPEARED AS FOLLOWS:

DAVID E. HAVILAND, ESQUIRE  
WILLIAM H. PLATT, II, ESQUIRE  
for the Plaintiff

EVAN KREINER, ESQUIRE (Pro Hac Vice)  
MATTHEW MARTINO, ESQUIRE (Pro Hac Vice)  
for Accredo, Curascript, ESHC, ESI

WENDY J. BRACAGLIA, ESQUIRE  
for Mallinckrodt

JOSEPH P. WALSH, ESQUIRE  
for Express Scripts

PHILIP BARTZ, ESQUIRE (Pro Hac Vice)  
for Mallinckrodt

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2 P R O C E E D I N G S

3 THE COURT: I guess I really shouldn't  
4 say good afternoon. You all have been struggling with  
5 this for a while. Mr. Platt.

6 MR. PLATT: Yes.

7 THE COURT: This is your motion to  
8 compel discovery.

9 MR. PLATT: Yes, it's Plaintiff's  
10 motion, Your Honor.

11 THE COURT: Yeah.

12 MR. PLATT: Yelp.

13 THE COURT: You were before the  
14 discovery master and a recommendation came out of the  
15 discovery master's discussions. You just couldn't  
16 figure out how you were going to conduct this  
17 discovery.

18 Would you like the appointment of a  
19 discovery master in this matter?

20 MR. HAVILAND: Your Honor, Don Haviland,  
21 for the Plaintiff.

22 And the answer is, yes, because I think  
23 it will facilitate things. I think defense counsels  
24 suggested it.

25 We would like to think that we could

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2 resolve things.

3 We came out of the discovery master with  
4 an order the court signed and then it was revisited.

5 And it got welled up in what happens  
6 more so in federal court than I think we see in the  
7 Commonwealth, electronic discovery -- and by the way,  
8 this morning we got 60,000 pages. I can't tell you  
9 what's sitting in the email, but it's not the basic  
10 kind of discovery we're seeking here.

11 So, the headline is this, at the  
12 original hearing there were 57 requests unanswered.  
13 Since that time they've answered 35 and produced, I  
14 believe, documents, although, they're not demarcated.

15 But there are 22 requests for production  
16 of documents from January, unanswered, just objected  
17 to.

18 And to give you a flavor for what they  
19 are, there was an FTC investigation into Acthar, the  
20 underlying drug, that led to prosecution and settlement  
21 by Mallinckrodt, the manufacturer for a \$100 million.

22 There were some change in practices.

23 The vendor of the program is here in  
24 Blue Bell, United Biosource. We have sued them because  
25 we believe that they are a part of the facilitation of

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2 that conduct.

3 And so we have asked for some basic  
4 stuff like the FTC documents, if there are any.

5 But we got an objection, which tells us  
6 well, there must something there.

7 We asked for investigation documents,  
8 which you could imagine, if a corporation is faced with  
9 something they're going to do an investigation, collect  
10 information. We didn't get that. But we did get it  
11 from the manufacturer.

12 So I did not want the Court to think  
13 that this is just locked up.

14 We got over a million pages of material  
15 that Mallinckrodt produced to the FTC, facilitated by  
16 the federal judge, who asked that that be produced,  
17 prior depositions be produced.

18 And we'll be in front of that judge on  
19 June the 24th.

20 But with Express Scripts, we had nothing  
21 when we were in front of Master Pugh. So I thought  
22 that order was appropriate.

23 Now, since that time and I think we're  
24 probably up to 280,000 pages.

25 We took a deposition this morning in the

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2 courthouse, which I thought was helpful.

3 We were able to get a corporate designee  
4 under oath to talk about United Biosource and what it  
5 does and what it doesn't do.

6 And what I learned from that is a couple  
7 of things, that the program, Judge, uses a basic form.  
8 It's attached to our complaint as Exhibit A, it's the  
9 Acthar Star Form that every single patient, including  
10 the beneficiaries of Local 542, our client, that gotta  
11 fill this out. The doctors gotta fill this out and  
12 sign it. And it is a paper form.

13 We don't today have those documents. We  
14 have none of the interfaces with the doctors that  
15 prescribed the medication.

16 We have none of the documents and the  
17 witness very ably described that an entire case number  
18 is created.

19 So I'm trying to break the logjam of the  
20 basic discovery and not get caught up in what we as  
21 lawyers unfortunately really get caught up in way too  
22 much about electronic discovery and protocols and  
23 custodians and search terms.

24 THE COURT: It's not that complicated.

25 MR. HAVILAND: I don't see it that way,

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2 Judge.

3 Now, I get that there are larger issues  
4 in the antitrust cases. I get that.

5 But also don't want to involve this  
6 court in that. Because that is a -- there is separate  
7 orders there.

8 I was just in Delaware County before  
9 Judge Dozer and we're dealing with the same issue about  
10 federal and state.

11 And I always try to go back to our  
12 rules. Because I heard some lawyers from out of state  
13 saying, oh, it's Pennsylvania, it's a Commonwealth.

14 And I read the preference, the  
15 explanatory comment from 1978. I just want to read it  
16 and I'll sit down.

17 The Pennsylvania rules have never been  
18 identical with the federal rules. From the beginning  
19 it was felt that the difference between the federal and  
20 state practice did not permit such identity.

21 That is why we have ours rules. And all  
22 I'm looking to do is follow those rules, enforce those  
23 rules and not get welled up into a federal practice  
24 which really doesn't belong here.

25 And so I want the contracts between 542

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2 and Express Scripts. We gave them ours but we don't  
3 have those documents back.

4 I want the contract file. We have a  
5 breach of contract claim.

6 Six months in to a year old case, we  
7 don't have the basic stuff.

8 So I'm hoping the Court can break that  
9 logjam before we go to a magistrate, because I know the  
10 master is going to want to have hearings and understand  
11 the case better.

12 But when I report to the Court as my  
13 headline, and I'll leave with, 22 objections and no  
14 answers on basic discovery, we really need the Court's  
15 interception.

16 Thank you.

17 THE COURT: That was Mr. Hughes.

18 MR. HAVILAND: Haviland. Mr. Hughes is  
19 in the back --

20 THE COURT: Haviland.

21 MR. HAVILAND: Yes.

22 THE COURT: Counsel, help me. And help  
23 me help my court reporter. State your name for the  
24 record.

25 MR. KREINER: Yes, sir, Your Honor.



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2 Evan Kreiner, of Skadden, Arps, Slate,  
3 Meagher and Flom, on behalf of the Express Scripts  
4 entities.

5 Your Honor, Mr. Haviland said a lot of  
6 things that I don't think are necessarily germane to  
7 what's before the court which is what he considers to  
8 be a logjam in discovery.

9 As he just mentioned, Your Honor, we've  
10 produced hundreds of thousands of pages of documents  
11 now. We've produced over 85,000 documents in  
12 discovery.

13 On May 1st we proposed custodians and  
14 search terms to Plaintiff so that we could get them the  
15 documents that they need.

16 They didn't respond to that proposal  
17 until June 10th. But notwithstanding their response --  
18 their lack of response about that custodian and search  
19 term proposal, we went ahead and applied those search  
20 terms to our custodians and started reviewing and  
21 producing those documents.

22 So I don't really think there is a  
23 logjam in discovery. And to the extent there is one,  
24 to the extent that custodian and search term  
25 negotiations haven't happened in this case since May

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2 1st, is because we only got a counterproposal from  
3 Plaintiff on June 10th.

4 Now, we're going through that  
5 counterproposal and will in good faith engage in  
6 negotiations about those custodians and search terms.

7 Moving forward we agree it's probably --

8 THE COURT: That makes your search  
9 manageable.

10 MR. KREINER: I'm sorry.

11 THE COURT: That makes your search  
12 manageable.

13 MR. KREINER: Yes, yes, Your Honor.

14 THE COURT: Regardless of whether you're  
15 in state or federal court, it makes your search  
16 manageable.

17 MR. KREINER: That's right, Your Honor.

18 THE COURT: All right.

19 MR. KREINER: But on the issue of the  
20 aside protocol, early in May, Your Honor actually  
21 ordered the parties to submit a protocol pursuant to  
22 which the discovery electronically stored information  
23 will be conducted in this case.

24 The Express Scripts entities along with  
25 our co-defendant, Mallinckrodt, we went ahead and

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2 submitted a proposed ESI protocol to Plaintiff.

3 And Plaintiff just didn't engage. And  
4 you can see that based on the email correspondence that  
5 I attached to my letter to the Court from May 10th and  
6 May 13th -- I'm sorry, on May 10th. We attempted in  
7 good faith to get that ESI protocol entered.

8 But like I said before, we are moving  
9 forward in good faith trying to get them all the  
10 discovery that they need notwithstanding the absence of  
11 an ESI protocol in this case.

12 So, as we stand right now, I'm not  
13 really sure what there would be to do on the  
14 Plaintiff's motion to compel.

15 We objected originally to all the  
16 documents requests on the basis of a lack of a  
17 confidentiality order that had been entered in the  
18 case.

19 And on the hearing in our motion for  
20 reconsideration Your Honor said that -- I think you  
21 said that seems like a valid objection. I don't want  
22 to take words out of your mouth or misconstrue  
23 anything.

24 But then once a confidentiality order  
25 had been entered, we started producing documents.

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2 So, Your Honor, all that to say, I'm not  
3 really sure what there is to do on Plaintiff's motion  
4 to compel. The motion to compel didn't take issue with  
5 any of the -- I think 22 -- our objections to the 22  
6 document requests, which we said we don't think this is  
7 requesting relevant information.

8 We would be happy to meet and confer  
9 with Plaintiffs about those objections, but they  
10 haven't really attempted to meet and confer about  
11 those.

12 So I'm standing here a little bit  
13 perplexed about what there is to do that we haven't  
14 done already. We, meaning the Express Scripts  
15 entities.

16 I am happy to answer any questions that  
17 Your Honor might have about the ESI protocol or really  
18 anything else about the conduct of discovery in this  
19 case and the discovery master.

20 Like I said, we would be happy to have  
21 our discovery master appointed to handle these issues  
22 as we go forward.

23 THE COURT: Thank you.

24 MR. HAVILAND: Your Honor, briefly, I  
25 could go through many of the 57, but I want to point

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2 out -- and they're attached -- the requests are  
3 attached to our motion to compel that Master Pugh  
4 heard.

5 Number 18, give us the documents about  
6 the medical providers who prescribed Acthar to the  
7 Local 542 beneficiaries.

8 Number 19, the payments by Local 542 of  
9 the beneficiaries for Acthar.

10 We learned today that that process  
11 begins with a paper form, filled out by a doctor. Now,  
12 it's faxed. And there is one case ID. And all those  
13 documents, the last exhibit I showed the witness and  
14 she's in the courtroom today, Judge.

15 Someone asked, in the company in 2018,  
16 can you pull the information for these 28 patients and  
17 it was done.

18 I asked her on the record, how long it  
19 would take to do that. She said one hour.

20 We are six months into this case and I  
21 don't have that information.

22 We are talking past each other because  
23 they want to talk about custodians and search terms.

24 I want to talk about 542's case.

25 And it's really going past each other.

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2 It can be done. It should be done. It hasn't been  
3 done.

4 And as far as me conferring, Judge, we  
5 don't get paid by the hour. We get paid to do the job.  
6 We get on the phone and we say, you've got an objection  
7 on relevancy, we disagree. If it says FTC  
8 investigations and your co-defendant produced, you  
9 should produce.

10 Relevancy is not an objection to  
11 something like that, when we can demonstrate the  
12 pathway.

13 I'll leave you with this. As far as the  
14 discussion about custodians, we asked the basic  
15 question. Organization charts.

16 I know Your Honor knows that you can  
17 only get into the understanding of a corporation by  
18 understanding the organization. We just got one such  
19 document which has the witness, Ms. --

20 THE COURT: So you're getting there,  
21 slowly but surely, you're getting there.

22 MR. HAVILAND: And I'm happy to have the  
23 electronic discovery for custodians go forward, but  
24 that is not what I asked for, Judge. I asked for very  
25 basic contract documents, provider documents.

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2 We have complicated this matter in a lot  
3 of ways. There are many, many people that we learned  
4 about today that aren't on their list. I suspect the  
5 federal judge in two weeks will be getting there.

6 And I want to tell you this, Judge. The  
7 list that they provided, to see a flavor for what the  
8 negotiations are like, has 14 people.

9 The federal judge ordered over 50  
10 depositions that we could take. Well, we're not taking  
11 50 depositions at the producing for 14 people.

12 So that is going to be dealt with in the  
13 nationwide antitrust class action that's going forth.

14 542 has a breach of contract claim, and  
15 it has a UTPCP claim. And that's the gist of our  
16 action.

17 And there are a couple of beneficiaries  
18 and there is an overcharge. And we want to discover  
19 that case, and not have it be welled up, subsumed and  
20 confused by what's going on in another court.

21 I think a magistrate here, appointed by  
22 the Court would be able to understand that. And when I  
23 talk about request number 19 as I just did say, when  
24 and how are you going to get those documents in this  
25 world of custodians and search terms, because these are

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2 corporate documents, Judge. They are not housed in any  
3 particular employee's file. That is the problem in the  
4 disconnect we have.

5 If the corporation has these patient  
6 files, then the corporation should produce them. It's  
7 not going to be picked up by searching Ms. Hebert's  
8 emails. It's really basic. I really do come back to  
9 it. It's a simple, simple matter. And we are stuck  
10 because we can get on the phone but this is what we --  
11 we hear the same thing.

12 You are not hearing anything different  
13 than the Plaintiff's counsel, if you're on the phone.  
14 Oh, we're doing custodians, and search terms and  
15 whether or not we should wild card Acthar. Should they  
16 have a wild card aligned, should it be within three --  
17 well, how about the contracts, how about the patient  
18 files, how about the actual contracts my client signed  
19 with your client, who we had the negotiations between.

20 THE COURT: Stop right there. Mr  
21 Kreiner.

22 MR. KREINER: Your Honor, we would be  
23 happy to meet and confer about our responses to their  
24 document requests. They never attempted to meet and  
25 confer about those document requests.



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2 But in addition, what Mr. Haviland is  
3 saying about our responses and objections is also  
4 inaccurate.

5 For example, we could look at our  
6 response to document request number one where we say,  
7 *within a reasonable period of time after a suitable*  
8 *protective order is entered -- it's a long response,*  
9 *but, we'll produce documents pursuant to a reasonable*  
10 *search, that the Express Scripts entity and many such*  
11 *requests made in the FTC code.*

12 If you look at document request number  
13 three, that is about our production. That's about  
14 documents that were produced to us in the FTC case. We  
15 said we would do that.

16 So just kind of at the outset, those  
17 representations are inaccurate.

18 But in any event, we would be happy to  
19 meet and confer about the substance of our responses  
20 and objections to their document requests, but they  
21 haven't tried to do that.

22 So to get the ball rolling, we have been  
23 applying search terms to our document custodians and  
24 we've been reviewing and producing those documents.

25 We're also happy to do these types of go

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2 get these -- if you were to ask us to go get these  
3 patients' files, we'll go and do that.

4 So we're not welling anything up by  
5 objecting on the basis of custodians and search terms.

6 We're -- the custodians we proposed and  
7 the search terms we proposed, we are reviewing those  
8 documents.

9 Your Honor, just one thing because  
10 Mr. Haviland brought up the coordination with the  
11 federal case -- and I don't mean to imply that the  
12 Defendants and Express Scripts entities are attempting  
13 to well anything up because of, you know, a lack of  
14 coordination with the federal case, but in a status  
15 hearing in front of the federal court, right before he  
16 filed this case, a few months before he filed this  
17 case, Mr. Haviland said -- it's a long quote and I  
18 actually have the transcript, so I can read it verbatim  
19 to you.

20 THE COURT: Hold on for one second.  
21 Let's get a factual basis. Mr. Haviland, you asked for  
22 some basic information.

23 MR. HAVILAND: Sure did. And they're in  
24 the request, Judge. So that is our ask.

25 THE COURT: Can you give him that basic

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2 information?

3 MR. KREINER: Yeah, of course we can.

4 MR. HAVILAND: Can we have a date?

5 MR. KREINER: Which basic information  
6 are you talking about?

7 MR. HAVILAND: Request number 19, could  
8 you produce the documents including the patient  
9 information for the Plaintiffs' beneficiaries?

10 MR. KREINER: I'm happy to go back with  
11 that request to the client.

12 THE COURT: I can't hear you.

13 MR. KREINER: I'm happy to go back to  
14 the client for that request. I don't want to make a  
15 misrepresentation to the Court because what this  
16 request is actually about isn't connected to what he  
17 has been talking about with Ms. Hebert. It's for a  
18 different corporate entity.

19 If they have that reasonably available,  
20 we'll go get it and produce it right away.

21 MR. HAVILAND: Judge, yesterday because  
22 defense counsels were complaining that the Plaintiff  
23 hadn't produced documents, I actually sent them the  
24 Express Scripts data run for my client. Their  
25 documents. And I pointed out the names of the doctors,

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2 Clouser, Kurdaniac. I'm giving them their stuff back  
3 to facilitate this.

4 So on number 18, I want all the medical  
5 provider information. What I learned today is when  
6 that form gets filled out, there is an interplay.  
7 There is a prior authorization. There's efforts that  
8 happen.

9 So, you know, I'm struggling here that  
10 we're hearing, we'll go do it. This is the go ask from  
11 January.

12 We're getting caught up in these larger  
13 nuance arguments about volumes, when these are very  
14 finite requests.

15 By the way, it doesn't say as to any  
16 other plaintiff, as to any other beneficiary, it's the  
17 Plaintiff here.

18 So I really want the Court,  
19 respectfully, to enter an order, so we have a line,  
20 because now we're into the summer, and we're going to  
21 get to September, and then maybe we will have gotten  
22 there on some of these basic requests or not, but  
23 Master Pugh heard very little on this and said, you  
24 know what, you haven't answered, there is no substance  
25 to what you're doing, when you object on grounds of

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2 relevancy, but you admit that there are FTC documents.

3 And by the way, Your Honor, the  
4 objection was, when a protective order is entered.  
5 Your Honor signed one that was stipulated two months  
6 ago, two months ago.

7 By the way, they waited to respond to  
8 our proposed stipulated order, then they finally agreed  
9 it to, but it's been two months. So when, when?

10 And if I don't get an order, Judge, we  
11 will be talking and talking. We saved the Court on  
12 this argument all that Mr. Platt argued with Master  
13 Pugh, the emails, the phone calls.

14 To suggest that we're not meeting and  
15 conferring is preposterous. We email and talk all the  
16 time in the context of the federal case and the this  
17 case. The phones work both ways.

18 I can't convince them to get off the  
19 relevancy objection if they don't want to do it. And  
20 they put up the order on the protective order. Okay.  
21 Two months have gone by. That was one of your stones  
22 cast. What's next? Either you have them or you don't.

23 And without an order, Judge, we have  
24 nothing to hold their feet to the fire other than the  
25 rules. And the timing went out the water, frankly. It

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2 was 30 days. The response came. We had 22 objections  
3 and no movement.

4 So my request is -- my ask is in the  
5 request. I think they're all relevant. We could brief  
6 that one by one if the Court were to ask for it.

7 But a blanket objection is -- I find it  
8 really hard as an advocate to deal with a blanket.  
9 Relevance, Judge. It's irrelevant, Mr. Haviland.

10 Even though I just told you, Judge, the  
11 FTC investigated this drug, this conduct, got the other  
12 company that manufactured to agree to sublicense  
13 Inactin and to pay \$100 million, but it's irrelevant.  
14 It's irrelevant to the claims here that are affecting  
15 my client, apparently.

16 MR. MARTINO: If I may interject. Mat  
17 Martino from Skadden.

18 THE COURT: Speak up.

19 MR. MARTINO: Matthew Martino, from  
20 Skadden.

21 So he just talked about two different  
22 requests. The FTC request does not contain a relevance  
23 objection. So I'm not sure what he is talking about.

24 We said if we have FTC documents we will  
25 search and produce those. That search is in process.

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2 The one he referred to, number 18, which  
3 relates to medical provider information, we did object  
4 to relevance. We said that is not relevant to your  
5 claims about misrepresentations that were made to other  
6 entities, not to any providers.

7 Typically what you will do in a case  
8 like this, is you will talk to the Plaintiffs and you  
9 will say, we don't think it's relevant as we stated in  
10 our objection.

11 Can you tell us why you think it's  
12 relevant and then we can decide whether we think that  
13 we're going to search for those documents and produce  
14 them, and if we don't, then you can take that to the  
15 court and say why you think it's relevant.

16 We've never had that conversation. He  
17 says we talk all the time. We do not talk all the  
18 time. And we never had a conversation about any of  
19 these specific requests, about how they are relevant or  
20 not.

21 We have this all the time in every case  
22 I've been on, we talk to the plaintiffs and they say  
23 your objection on relevance is wrong and this is why we  
24 think it's relevant. This is why we think it is likely  
25 to lead to discoverable evidence.

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2 We've never had that conversation with  
3 respect to our objections where we said we will not  
4 produce documents based on relevance. That's never  
5 happened.

6 MR. HAVILAND: Your Honor, in the  
7 federal court the very first thing I said to Judge  
8 Johnson, two years ago, he said, Mr. Haviland, what do  
9 you want?

10 I said I want three things. I want the  
11 FTC documents.

12 I want the Retrophin documents and I  
13 want the contracts between these companies.  
14 Mr. Martino will nod because I did that.

15 And every time I got in front of the  
16 magistrate I said, judge, I'm broken a record, three  
17 things.

18 To argue that it's not relevant today,  
19 in this courtroom, the FTC documents, if they exist  
20 should be produced.

21 I need a court order, Judge, because the  
22 judge in federal court said, if you have them, produce  
23 them.

24 The company, the manufacturer did,  
25 Express Scripts didn't.



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2 Mr. Martino has argued, well, if they  
3 exist.

4 Well, tell me if they do. If they  
5 don't, why are we fighting about it.

6 Can I just ask one other thing, Judge?  
7 There was a suggestion for a specific master. We've  
8 got plenty of qualified people.

9 I think Mr. Walsh -- and I've known Mr.  
10 Walsh since high school.

11 He suggested Connor, O'Boyle. We did  
12 some things. He works at Elliott, Greenleaf.

13 Appoint somebody so we can have someone  
14 that will police this argument that I haven't raised  
15 relevancy of FTC. I have been a broken record on that  
16 subject for two years.

17 MR. MARTINO: If I may, just one more  
18 point.

19 And we can go back to the transcript.  
20 Again, I did not say there was any relevance objection.  
21 In fact, I stated exactly the opposite. We did not  
22 object on relevance based on the FTC documents.

23 We objected on relevance based on the  
24 other one he referred to, number 18, the medical  
25 providers.

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2 Any time we object on relevance it will  
3 be crystal clear from the objections which he has never  
4 engaged us on.

5 We never objected to relevance on the  
6 FTC documents. I cannot make that clear enough.

7 THE COURT: Well, Mr. Haviland is not  
8 here seeking a ruling on objections that were raised.  
9 He is here on a motion to compel.

10 MR. MARTINO: Yes.

11 THE COURT: He is not challenging the  
12 objections that were raised.

13 MR. MARTINO: But on that motion to  
14 compel he mentioned earlier we have 22 document  
15 requests for which we objected based on relevance.

16 THE COURT: Well, that is not before the  
17 court right now.

18 MR. MARTINO: Correct, but I assume he  
19 is moving to compel those documents. So those  
20 documents, typically before a motion to compel, you  
21 have to meet and confer on those and have a discussion.  
22 It's in the rule, about why we think they're not  
23 relevant and he thinks --

24 THE COURT: The three category of  
25 documents that -- you objected to the three category of

1 LOCAL 542 VS. MALLINCKRODT, ET AL 27  
2 documents.

3 MR. HAVILAND: The three categories that  
4 I pointed to the federal court, the FTC investigation  
5 of private litigation involving a company called  
6 Retrophin and the contract documents, yes.

7 The federal judge, even before there was  
8 a ruling on the motion to dismiss, which we prevailed  
9 on, ordered that they be produced. But as to the FTC,  
10 and so we're staying focused here in our lane, that is  
11 one of the first and second requests in our request.

12 And they have not produced them. So I'm  
13 here to compel those documents. You heard the  
14 relevancy.

15 MR. MARTINO: As far as the FTC, that is  
16 not a thing to our understanding exists. Those  
17 documents don't exist. We're searching to see if those  
18 exist. But we don't believe that there are such  
19 documents. That's what we said. We did not object on  
20 relevance. We said we will search for them. We're in  
21 the process of looking to see if there are any.

22 THE COURT: Can you give an answer?

23 MR. MARTINO: On the FTC we should be  
24 able to do that very quickly. I mean, we're looking  
25 for them now. We're in the process of doing it.

1 LOCAL 542 VS. MALLINCKRODT, ET AL 28

2 And part of this is identifying the  
3 people who would have such documents.

4 What date?

5 MR. KREINER: Two weeks.

6 MR. MARTINO: Two weeks. We've produced  
7 the contracts.

8 THE COURT: Don't put each other on the  
9 spot.

10 MR. MARTINO: I know Evan is --  
11 Mr. Kreiner, I'm sorry, is more closely aligned with  
12 the client communications. That is why I'm asking him.

13 But the contracts that he mentioned,  
14 we've already produced.

15 Retrophin, we were not involved in that  
16 litigation, so we do not have those documents.

17 And the FTC documents, if Mr. Kreiner  
18 tells me two weeks, we can do it in two weeks.

19 And again, we did not object to  
20 relevance on those documents.

21 THE COURT: Two weeks.

22 MR. MARTINO: For request number one,  
23 correct.

24 THE COURT: By June 28th.

25 MR. MARTINO: Sure.

1 LOCAL 542 VS. MALLINCKRODT, ET AL 29

2 THE COURT: Mr. Haviland.

3 MR. HAVILAND: That's one, Judge. We  
4 have 57.

5 I just heard, despite the fact there was  
6 a non response that they don't have Retrophin  
7 documents, which is request number two.

8 MR. MARTINO: I'm not sure what you mean  
9 by a non response.

10 We say in here we will do a search and  
11 produce any documents that are discovered. No  
12 documents were discovered.

13 MR. HAVILAND: Well, then, the amend the  
14 answer, say there is no documents and we shouldn't be  
15 arguing about something that you can simply say.

16 MR. MARTINO: Okay. I understand what  
17 you're saying.

18 So for each request where we don't find  
19 anything we can send you a no response.

20 THE COURT: Hold on for one second.  
21 Let's take a brief recess so that counsel can meet and  
22 confer.

23 - - -

24 (Recess)

25 - - -

1 LOCAL 542 VS. MALLINCKRODT, ET AL 30

2 THE COURT: Today I signed the  
3 stipulation that add parties to the confidentiality  
4 order. All right.

5 And we have the stipulation of proposed  
6 confidentiality order. I signed that April 17th.

7 MR. KREINER: That is -- Your Honor,  
8 yes, yes.

9 THE COURT: All right. So you've got  
10 that in place and you're ready to produce documents.

11 MR. HAVILAND: So, Your Honor, I'll  
12 report on our meet and confer.

13 As to that category of the FTC  
14 documents -- I'll kind of truncate -- we got up to  
15 number 14. And here's what we got to. Your Honor had  
16 suggested June 28th. I thought that was a good date.  
17 Counsel suggested their client has a conflict. They  
18 would like til July 5th. We're agreeable to that.

19 Here's what I understand the agreement  
20 is so far. That as to the documents that cover  
21 generally the first six or so requests, the FTC  
22 investigation documents and then a host of other  
23 litigations, Judge, I'll just reel them off.

24 It's the FTC case, there is the  
25 Retrophin case, the In re: Questcor case, the Shenk

1 LOCAL 542 VS. MALLINCKRODT, ET AL 31  
2 case, the Franks case and the Dhaliwal. They are all  
3 cases involving Mallinckrodt and Acthar in some way,  
4 shape or form.

5 We've asked for these requests for the  
6 Express Scripts Companies to produce documents, to the  
7 extent that they were involved in any way.

8 And the agreement, I believe, is by July  
9 the 5th they are going to tell us if they have  
10 documents.

11 Is that fair?

12 MR. MARTINO: Yes, or where we stand,  
13 yes, and no, if we don't.

14 MR. HAVILAND: And so we'll know if  
15 they're there. So we're not arguing in a vacuum to  
16 Your Honor that there may be documents.

17 We just finished up with a situation  
18 with Marshall, Dennehey where we found out there  
19 actually is a file. We are now fighting in the court  
20 over the file.

21 So let's get to the point where we know  
22 there is a file to be produced, if it's going to be  
23 produced.

24 That encompasses request one through  
25 eight.

1 LOCAL 542 VS. MALLINCKRODT, ET AL 32

2 THE COURT: Well, you've got the FTC  
3 case, the Dhaliwal case, the Retrophin case, the Franks  
4 case.

5 MR. HAVILAND: Yes. And then the  
6 Questcor Securities case. And then the Mallinckrodt  
7 Securities case.

8 THE COURT: All right.

9 MR. HAVILAND: And so that whole group,  
10 Judge, covers document requests; documents produced;  
11 documents received and transcripts in all of those  
12 cases, which I had suggested to the federal judge puts  
13 us ahead in our case because we're building upon  
14 discovery records in other cases.

15 And the commitment is that they will  
16 respond, that is the Express Scripts Defendants, if  
17 there are those documents and if so, whether they're  
18 going to produce them all by July 5th.

19 THE COURT: That was request one through  
20 eight.

21 MR. HAVILAND: Yes.

22 After that, Judge, we hit the series of  
23 objections. I think there were 22 in all.

24 We began talking about investigation  
25 files and so on. We talked about relevancy and burden.



1 LOCAL 542 VS. MALLINCKRODT, ET AL 33

2 And I finally suggested that since we're  
3 keen to a date, perhaps defense counsel will talk to  
4 the client to see if they are going to stand on those  
5 objections because it's just objections with no  
6 agreement to produce.

7 And so our agreement, I believe, is that  
8 for the 22 and all that have been objected to with no  
9 commitment to produce, they're going to respond by the  
10 5th whether or not they're going to stand on those  
11 objections.

12 And I would like to see an objection  
13 that it's irrelevant and their basis for why it's not.

14 THE COURT: Not reasonably calculated to  
15 lead to discoverable evidence, technically not  
16 relevance, but that's all right.

17 MR. HAVILAND: Exactly. But more than  
18 just burden. In fact, if there are documents and there  
19 is some burden, we need to know that to be able to  
20 address that. Whether it's a proportionality argument  
21 or what is it.

22 But when we don't know if there's been  
23 an investigation, whether there's been reprimands of  
24 employees for violating policies, we're, again, in that  
25 vacuum, Judge. We're not arguing about documents.

1 LOCAL 542 VS. MALLINCKRODT, ET AL 34

2 We're arguing about requests.

3 So the commitment, I believe, is for  
4 counsel to confer with their client and get back to us  
5 by July 5th on the 22 objectionable requests.

6 That is as far as we got, Judge.

7 The other balance of the 35, the basic  
8 boilerplate was, when Your Honor enters an order on the  
9 confidentiality, which you've done, there is a  
10 commitment to produce documents at a reasonable time.

11 Without going through, again, Judge, I  
12 began with number 18, but if I go back to some earlier  
13 requests, 15 asked for the actual document -- the  
14 form -- I have a copy here Judge that was attached to  
15 our complaint.

16 It was filled out for our clients'  
17 beneficiaries.

18 So 15, 16, 17, I think I got to 18, all  
19 go to very specific information about our client and  
20 our clients' case. And we didn't get any further than  
21 that.

22 Although, I learned this morning that  
23 there is a facility to do that fairly straightforward.  
24 I'd like either a commitment or some direction from the  
25 Court to get that, because we need to start discovery

1 LOCAL 542 VS. MALLINCKRODT, ET AL 35  
2 in the 542 case outside of what's going on in federal  
3 court.

4 And we have a whole day, Judge.  
5 June 24th we are in front of the magistrate and next  
6 month we are in front of the district judge who's  
7 replaced the retiring judge. So we have two sessions  
8 in federal court in the next eight weeks.

9 And I imagine a lot of the issues you  
10 are hearing about today will be addressed there.

11 I've been focused on the things we've  
12 asked for our client to prove our breach of contract  
13 and consumer fraud claims here.

14 So unless the Defendants are committing  
15 that as to those specific requests which go to finite  
16 contract documents, these forms, the medical files -- I  
17 mean, I kind of want to step over here and say if I was  
18 just bringing a garden variety, medical negligence  
19 case, and I've got a hospital and a doctor, by the way,  
20 I've never done that, Judge, but it would be pretty  
21 straightforward to say, geez, I'd like to have the  
22 medical records and I'd like to have the payment  
23 records.

24 I can't imagine we would be fighting  
25 over that as far as bringing that claim.

1 LOCAL 542 VS. MALLINCKRODT, ET AL 36

2 So our claim is no different in the  
3 sense that we're arguing there's consumer fraud by the  
4 economic payment for Acthar.

5 And the way that came about was, as the  
6 witness testified today, this form. And then this form  
7 generated documents from the provider, from the payor.

8 And I really just want to get those  
9 documents, which could be done in an hour but hopefully  
10 could be done sooner.

11 THE COURT: That is then going into your  
12 request number 19.

13 MR. HAVILAND: Yes.

14 16, 17, 18, 19 are -- 16, Your Honor, is  
15 the forms. 17 is the data base.

16 We learned today there is actually a  
17 data base maintained of these forms. It's all keyed to  
18 a case file by the patients.

19 And then 18 is the medical provider  
20 information which, again, is linked to that patient.

21 And then 19 is payment information which  
22 I think is probably in part tied to that because there  
23 is benefits coverage that's confirmed.

24 THE COURT: And 20 is the billing  
25 information.

1 LOCAL 542 VS. MALLINCKRODT, ET AL 37

2 MR. HAVILAND: And then the billing  
3 information, yelp.

4 And we're moving through that decision  
5 tree, Judge, from the actual prescription through the  
6 bill to the payment.

7 Twenty-one is payor information. And  
8 they do data base payor information about, I believe,  
9 my client.

10 We have heard about Aetna this morning.  
11 We have heard about Med Mutual of Ohio. So there is  
12 data base information about payors.

13 And we've asked about that because one  
14 of the issues is again, our beneficiaries getting this  
15 medication and paying for it.

16 So we're moving from the patient up to  
17 the Plaintiff, Operating Engineers 542, who utilizes  
18 Express Scripts as its PVM.

19 I think counsel represented that while  
20 we're moving from United Biosource to Express Scripts,  
21 Judge, it's all Express Scripts we learned.

22 So when I'm asking these questions -- by  
23 the way the request went to the Express Scripts  
24 companies, including Curascript, and Accredo and United  
25 Biosource.

1 LOCAL 542 VS. MALLINCKRODT, ET AL 38

2 So the payment information, I imagine is  
3 in the PVM sphere but accessible.

4 But that gets up, Your Honor, to number  
5 21.

6 THE COURT: Mr. Kreiner.

7 MR. KREINER: Yeah, Your Honor, we don't  
8 need to have a fight about those things.

9 To the extent he wants us to expedite  
10 the discovery of those requests as opposed to the  
11 600,000 documents that belong to the custodians, we can  
12 expedite those requests. This doesn't need to happen  
13 here. Happy to talk about it. Happy to do it in a  
14 couple of weeks, if we can.

15 THE COURT: One through eight, 15  
16 through 21.

17 MR. HAVILAND: We got that far, yes,  
18 Your Honor.

19 If we do all that by the 5th of July in  
20 terms of the production, if there is a lag time on  
21 that, but we set a hard date, because I don't think  
22 they're that complicated, those patient beneficiary  
23 payor requests. They're finite to our client and our  
24 clients' case.

25 I would like to get a hard date on that

1 LOCAL 542 VS. MALLINCKRODT, ET AL 39  
2 production.

3 MR. MARTINO: I think one issue may just  
4 be part of what we objected to.

5 If you read the request, it says all  
6 documents that include payor information related to  
7 Plaintiff.

8 If there is a data base that's one  
9 thing.

10 But all documents that could contain --  
11 I mean, there could be emails.

12 And that is where we are talking about  
13 who are we searching, which custodians, which search  
14 engines. That could be a very broad set of documents.

15 THE COURT: See, they really want to  
16 conscientiously respond and they know if they say all  
17 documents you can be thinking about email.

18 MR. HAVILAND: Sure. But, Your Honor, I  
19 learned this morning that there is one reimbursement  
20 specialist that is assigned. And so there are three.  
21 I learned this, this morning. That is why a deposition  
22 is a wonderful thing. There are potentially three  
23 people who are assigned to my clients' cases. And so  
24 those people are the interplays. And it's just those  
25 people. But Judge, they're not on their list.

1 LOCAL 542 VS. MALLINCKRODT, ET AL 40

2 They could have known that fact because  
3 it's their company and how they operate. I learned  
4 that this morning. Those folks have to be added to the  
5 list in order to answer that request.

6 I don't disagree that I want those  
7 communications, but I want the portal which is the  
8 company documents that are all assembled under one case  
9 number.

10 And whether or not there's emails  
11 outside of that, I would be surprised, based on what we  
12 heard this morning, but, I guess it's possible.

13 And they should search that specialist  
14 for those documents and they should be in the cue.

15 I'd like to see those names. I don't  
16 know who the names are because, Judge, I got this as  
17 the word chart. There is a universe of hundreds of  
18 people in the organization.

19 So I can't tell them who those RSs are.  
20 I don't know. I suspect as I learned from the witness  
21 is folks come, folks go. They're hired, they do the  
22 job and they move on.

23 So during the window of time from, I  
24 think we go from 2011 through 2016, who were the  
25 specialists dealing with my client, if it was one



1 LOCAL 542 VS. MALLINCKRODT, ET AL 41

2 person, two people. I can't tell them that.

3 This is honestly the job of the  
4 Defendant, which the Plaintiff is doing in our own  
5 office, Judge.

6 Operating Engineers is right off of the  
7 Turnpike, everybody's probably past by it, right by the  
8 LA Fitness. And we are in there looking at the  
9 requests they propounded for the documents, contract  
10 files, the individual information about our client. We  
11 are doing that. That's all I'm asking of them to do.  
12 I can't give them the names.

13 MR. MARTINO: We have not received any  
14 custodial -- I mean any work charts for his client. We  
15 have a company that exists of thousands and thousands  
16 of employees in many different divisions. He has a  
17 union. We have no information about who the  
18 custodian -- the work chart, custodians or anything  
19 that would be for there.

20 But proportionality here is obviously --  
21 it's very disproportionate discovery on us as compared  
22 to his client. We've so far produced 80 something  
23 thousand documents to date and I think he's produced 50  
24 documents, perhaps. So that disparity is obviously  
25 very large.

1 LOCAL 542 VS. MALLINCKRODT, ET AL 42

2 So as much as he can say we're doing  
3 this, it's a very different burden for him to do this,  
4 than it is for us to do this. And we are obviously  
5 working diligently.

6 THE COURT: Well, I'm happy that -- if I  
7 can help you with that. I'm thinking of someone to  
8 appoint as a discovery master as your issues come up.  
9 I'm thinking of a discovery master who is pretty -- who  
10 is very conscientious and very good. His name is  
11 Andrew Braunfeld. Are you familiar with him?

12 MR. WALSH: I am, Your Honor. And I've  
13 used him several times in complex cases, Your Honor.

14 THE COURT: He's very good. In the  
15 meantime I can appoint Mr. Braunfeld. I can speak with  
16 him to see if his schedule will allow that.

17 And then -- but we've got -- so far  
18 we've got one through eight and 15 through 21. You're  
19 going to work on responding, is that right?

20 MR. HAVILAND: That is right.

21 MR. MARTINO: Yes, Your Honor.

22 THE COURT: Between now and July 5th.

23 MR. MARTINO: Yes, Your Honor. And I  
24 just wanted to reiterate what I said earlier. So for  
25 21, for example, I do not think it is likely we will

1 LOCAL 542 VS. MALLINCKRODT, ET AL 43

2 have produced documents by the 5th because he is asking  
3 for all documents, so that will require -- but we  
4 certainly can find the names of the people that he  
5 asked about, whose files we would need to search and  
6 begin to run a search and whatnot, but that takes a  
7 little time, as you can imagine.

8 THE COURT: Skadden, Arps, how long have  
9 you been on the file?

10 MR. MARTINO: On the case itself or the  
11 discovery?

12 THE COURT: The case.

13 MR. MARTINO: Since the beginning of the  
14 case.

15 MR. KREINER: This was filed in May of  
16 2018.

17 MR. HAVILAND: We're a year, Judge.

18 THE COURT: I have a full appreciation  
19 that Skadden and Arps has been knee deep in this case.  
20 I understand that fully. We have got a July 5th date  
21 on the order. Let's get going. Before you know it  
22 your time will run out. It's a complex case, 2018.  
23 You need to get cracking on your discovery.

24 Mr. Haviland, your point is well taken.  
25 You are working hard, but you got to meet and confer

1 LOCAL 542 VS. MALLINCKRODT, ET AL 44  
2 and work together. I know you are not going to work  
3 together to a certain extent. You're going to have  
4 pull it out of them.

5 MR. HAVILAND: That's the nature of the  
6 business, Judge.

7 THE COURT: Right.

8 MR. KREINER: Your Honor, Joe Walsh.  
9 Just so I'm clear, so with respect to those category or  
10 documents which the defense has agreed to produce by  
11 July 5th, so we dispose of that part of the universe,  
12 the remainder will be submitted to Mr. Braunfeld to try  
13 to expedite some sort of resolution. Is that what you  
14 were looking at.

15 MR. HAVILAND: So can I add just one --  
16 so we got so close to finishing my client. The last  
17 two, Judge, 22 and 23 are relating to the distribution  
18 of the product to my client beneficiaries.

19 22 is the shipment of the drug from  
20 Curascript, the entity in Florida. So we'd like to --  
21 what I'm trying to do is --

22 THE COURT: Are you really in a rush for  
23 that?

24 MR. HAVILAND: Well, I think it's all  
25 part of the same thing, Judge. My sense is the hub --

1 LOCAL 542 VS. MALLINCKRODT, ET AL 45

2 it's here in Blue Bell really does coordinate all that.

3 I don't think we're asking a unique set  
4 of questions. We're asking from point to form to point  
5 of distribution and receipt. We've heard that there is  
6 a data base that actually confirms that.

7 So I don't think it's anymore  
8 burdensome. I'm asking from start to finish. The  
9 patient gets the prescription; the patient gets it. We  
10 pay for it.

11 I think if we go to Mr. Braunfeld, we  
12 then start with the larger issues that we have in the  
13 case, which I think begin at 24. Communications from  
14 patients about the program, complaints.

15 And they've objected and they are bigger  
16 issues beyond my client, and we're trying to  
17 demonstrate what's going on in the universe in  
18 Pennsylvania, especially here, with the same sales reps  
19 and so on.

20 So it is really up to 23 that ends  
21 the -- if they think that the distribution part is  
22 particularly different, I'm sure they can tell me that  
23 between now and July 5th.

24 But if we go to 23, I think we have  
25 rounded out the universe of my client's experience with

1 LOCAL 542 VS. MALLINCKRODT, ET AL 46  
2 these companies from point of prescription to point of  
3 the receipt and payment.

4 THE COURT: Mr. Walsh, thank you. Thank  
5 you for that. So now if we can delineate exactly what  
6 you will need Mr. Braunfeld for.

7 MR. KREINER: Your Honor, would you do a  
8 general referral to a discovery master. That's the way  
9 it works.

10 MR. MARTINO: Yeah, I think that is  
11 helpful.

12 THE COURT: Now, the parties will be  
13 sharing the cost of this discovery master.

14 MR. WALSH: That's correct, Your Honor,  
15 we acknowledge that.

16 MR. MARTINO: That's correct.

17 MR. HAVILAND: So, Your Honor, we face  
18 this a lot. It has to be per party. There are four  
19 companies here, one of which is no longer a part of  
20 Express Scripts. So as long as we are head counting  
21 properly. It shouldn't be 50/50, Plaintiff versus  
22 Defendants.

23 Because I have been in cases especially  
24 in New Jersey where the magistrate process becomes  
25 really cumbersome with drug companies, because there is

1 LOCAL 542 VS. MALLINCKRODT, ET AL 47

2 15 of them and one of us.

3 I can show you the order we got in that  
4 case. BY the way, that case is still going on 15 years  
5 now. The cost continues to mount.

6 But it is a pro rata based on the  
7 parties. So I would ask that you put that in so it's  
8 proportional cost. So it's not half the bill every  
9 time the Defendants have an issue the Plaintiff has to  
10 take up.

11 MR. WALSH: Well, if we collectively  
12 represent more than one party, it should be our group  
13 of litigants will be counted as one, because there are  
14 different entities that are named in the complaint.

15 THE COURT: Pro rata share is the  
16 fairest.

17 MR. MARTINO: I understand that, Your  
18 Honor.

19 MR. HAVILAND: Well, that's what I'm  
20 suggesting. Your Honor, Biosource assumed part of  
21 Express Scripts. It's a private equity firm that took  
22 the company and that is a separate entity. They have  
23 separate exposure, separate general counsel.

24 So it really is a party -- Curascript  
25 and its other entity, IC is one, but Accredo is a

1 LOCAL 542 VS. MALLINCKRODT, ET AL 48  
2 company in Memphis. There are four companies we sued.  
3 The complaint is very clear.

4 THE COURT: You all can continue to do  
5 it for free without the appointment of a discovery  
6 master if you would just meet and confer.

7 MR. WALSH: Unfortunately, that has not  
8 been productive. What has been is the fact that I  
9 think everybody agrees that the assistance of a  
10 discovery master will be of benefit in the case, your  
11 Honor, not only to us but also to the Court, Your  
12 Honor.

13 MR. HAVILAND: And with the caveat,  
14 Judge, that we have a client as well and have to  
15 explain that it is cost effective to this litigation to  
16 engage the services of a master and if it's 50/50 my  
17 client won't agree. I can't agree to that.

18 MR. WALSH: We will agree to pro rata,  
19 Your Honor. That's fine, in an effort to move this  
20 along.

21 THE COURT: Okay.

22 MR. HAVILAND: My partner is pointing  
23 out, a couple times we learned that every time we talk  
24 with Express Scripts, we don't involve the other  
25 company. And with that order Your Honor signed this



1 LOCAL 542 VS. MALLINCKRODT, ET AL 49  
2 morning, I got an email saying, oh, by the way, we're  
3 going to join into that protective order and I said I  
4 felt we had a protective order. So I don't want to  
5 loose Mallinckrodt in this discussion in terms of if we  
6 are going to have a discovery master it is for all  
7 parties.

8 I can't make that representation that  
9 Mallinckrodt is on board with the pro rata.

10 MR. BARTZ: My name is Philip Bartz,  
11 yes, we are fine, Your Honor, with having the discovery  
12 master. We don't have any disputes at this moment but  
13 Lord knows we probably will. So there you go.

14 THE COURT: Ms. Bracaglia, is that fine?

15 MS. BRACAGLIA: Yes.

16 THE COURT: Very good. Thank you. All  
17 right.

18 One through -- now we're skipping nine  
19 through 14. We've only covered one through eight and  
20 15 through 23. We'll refer any further discovery  
21 issues to the discovery master, Andrew Braunfeld. All  
22 right.

23 MR. MARTINO: Thank you, Your Honor.

24 MR. PLATT: Thank you, Your Honor.

25 MR. WALSH: Thank you, Your Honor.

1 LOCAL 542 VS. MALLINCKRODT, ET AL 50

2 MR. HAVILAND: Thank you, Your Honor.

3 MR. KREINER: Thank you, Your Honor.

4 - - -

5 (Whereupon, the proceedings concluded

6 at 3:55 p.m.)

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C E R T I F I C A T I O N

I hereby certify that the  
proceedings and evidence are contained fully and  
accurately in the notes taken by me in the above cause  
and that this is a correct transcript of the same.

CHANEL PYATT  
Official Court Reporter

- - -